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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERTO SALVADOR CONTRERAZ,

Defendant and Appellant.

H045787

(Santa Cruz County

Super. Ct. No. 16CR01219)

In September 2017, defendant Alberto Salvador Contreras¹ was sentenced to 10 years in state prison, execution suspended, and granted three years' probation. In May 2018, following a contested hearing, the trial court found that Contreras violated his probation. The trial court terminated probation and ordered execution of the previously-imposed prison sentence.

On appeal, Contreras argues that his case must be remanded so that the trial court can exercise its discretion² and consider dismissing a sentence enhancement imposed due to his personal use of a firearm (Pen. Code, § 12022.5, subd. (a)).³ He further contends that the trial court erred in staying, rather than striking, additional

¹ The record and the briefing contain several versions of defendant's first and last name, e.g., "Albert" and "Contreras." We have elected to use the version which appears most frequently and is also used on the abstract of judgment.

² This discretion arises from the enactment of Senate Bill No. 620 (Reg. Sess. 2017-2018) (Sen. Bill 620) which amended Penal Code sections 12022.5, subdivision (c) and 12022.53, subdivision (h). The amendments took effect on January 1, 2018.

³ Unspecified statutory references are to the Penal Code.

punishment imposed based on his admitting a criminal street gang enhancement (§ 186.22, subd. (b)(1)). In a supplemental opening brief, Contreras contends that his waiver of appellate rights does not bar consideration of this appeal.

We find that Contreras is not entitled to remand for reconsideration of the firearm sentencing enhancement since he failed to timely appeal from his sentence when it was initially imposed. Further, as discussed below, the trial court has stricken the criminal street gang sentencing enhancement, thus rendering that argument moot.⁴ Based on these conclusions, we need not reach Contreras's argument regarding the waiver of his appellate rights.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 2, 2016, Contreras was charged by information with second degree robbery (§ 211; count 1), participation in a criminal street gang (§ 186.22, subd. (a); count 2), carrying a concealed firearm (§ 25400, subd. (a)(2); count 3), and resisting a peace officer (§ 148, subd. (a); count 4). The information further alleged that, in connection with the robbery, Contreras was personally armed with a firearm (§§ 12022.5, subd. (a), 12022.53, subd. (b)) and committed the offense for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)).

On September 13, 2017, as part of a negotiated disposition, Contreras pleaded guilty to one count of felony second degree robbery (§ 211; count 1) and one count of felony assault by means likely to produce great bodily injury (§ 245, subd. (a)(4); count 5).⁵ Contreras also admitted the firearm and gang enhancement allegations

⁴ After briefing was completed in this case, the trial court forwarded copies of Contreras's abstract of judgment, amended nunc pro tunc on February 14, 2019. We issued an order to show cause why the record in this matter should not be augmented to include this document and invited the parties to further address how the amended abstract affects the arguments on appeal. Following receipt of the parties' briefs, we ordered the record augmented on the court's own motion to include the amended abstract of judgment.

⁵ This count was added to the information as part of the negotiated disposition.

(§§ 12022.5, subd. (a), 186.22, subd. (b)(1)) in connection with the robbery offense. In accordance with the plea agreement, the trial court dismissed counts 2, 3, and 4, and deleted the reference to section 12022.53, subdivision (b) from the firearm enhancement. The trial court then sentenced Contreras to a total term of 10 years, consisting of the upper term of five years on count 1, with a consecutive four-year enhancement for personal use of a firearm (§ 12022.5, subd. (a)) plus a consecutive one-year middle term sentence on count 5 (§ 245, subd. (a)(4)). The trial court also imposed and stayed a 10-year sentence on the criminal street gang allegation (§ 186.22, subd. (b)(1)).⁶ The trial court ordered execution of sentence suspended, and placed Contreras on three years' formal probation. Contreras did not appeal.

On February 20, 2018, the Santa Cruz County Probation Department filed a petition alleging that Contreras had violated his probation by failing to report, failing to participate in an educational/vocational/therapeutic program, failing to pay fines and fees, and failing to pay restitution. The trial court held a contested hearing on the petition on May 3, 2018 and found that Contreras violated his probation. Accordingly, the trial court terminated probation and executed the previously imposed prison sentence of 10 years.

II. DISCUSSION

A. Firearm enhancement

Citing *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), Contreras argues Sen. Bill 620, which amended section 12022.53, subsection (h) to give trial court's discretion to strike firearm sentence enhancements, retroactively applies to his case, and we should remand the matter to the trial court so it may exercise that discretion. The Attorney General argues that Contreras is not entitled to the retroactive application of the

⁶ On February 14, 2019, the trial court amended the abstract of judgment, nunc pro tunc, to reflect that the punishment for the criminal street gang enhancement was stricken, rather than stayed.

amendment made by Sen. Bill 620 because the judgment against him was final when that amendment came into effect. We agree with the Attorney General.

1. *Amendment of section 12022.5*

In 2017, the Legislature amended section 12022.5, subdivision (c), which now reads: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” The amendment took effect on January 1, 2018. (Stats. 2017, ch. 682, § 2, p. 5104.) Prior to its enactment, trial courts did not have the discretion to strike or dismiss firearm enhancements imposed under section 12022.5.

2. *Retroactivity of ameliorative amendments under Estrada*

Under the *Estrada* rule, “we presume that newly enacted legislation mitigating criminal punishment reflects a determination that the ‘former penalty was too severe’ and that the ameliorative changes are intended to ‘apply to every case to which it constitutionally could apply,’ which would include those ‘acts committed before its passage[,] *provided the judgment convicting the defendant of the act is not final.*’” (*Estrada, supra*, 63 Cal.2d at p. 745 [italics added].) The *Estrada* rule rests on the presumption that, in the absence of a savings clause providing only prospective relief or other clear intention concerning any retroactive effect, ‘a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.’ [Citation.] ‘The rule in *Estrada* has been applied to statutes governing penalty enhancements, as well as to statutes governing substantive offenses.’ ” (*People v. Buycks* (2018) 5 Cal.5th 857, 881-882.)

3. *Finality of sentence*

The crucial question in this case is whether or not the judgment against Contreras was final at the time that the amendment to section 12022.5, subdivision (c) became effective, i.e., January 1, 2018. It was.

“ ‘For purposes of the *Estrada* rule, a judgment is “not final so long as the courts may provide a remedy on direct review [including] the time within which to petition to the United States Supreme Court for writ of certiorari.” ’ ” (*People v. Barboza* (2018) 21 Cal.App.5th 1315, 1319.) An order of probation is “deemed to be a final judgment” within the meaning of section 1237 for the purpose of taking an appeal. (§ 1237, subd. (a); *People v. Howard* (1997) 16 Cal.4th 1081, 1087.) “When a trial court imposes a state prison sentence and suspends execution of that sentence during a probationary period, the judgment rendered is a final judgment for the purposes of appeal.” (*Barboza, supra*, at pp. 1318-1319.) “[A] defendant who elects not to appeal an order granting or modifying probation cannot raise claims of error with respect to the grant or modification of probation in a later appeal from a judgment following revocation of probation.” (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421.)

In this case, Contreras was sentenced on September 13, 2017 and he took no appeal. As a result, the judgment against him became final after 60 days, or November 13, 2017.⁷ Sen. Bill 620 took effect on January 1, 2018, 110 days after Contreras’s sentencing and he is not entitled to the retroactive benefit of the amendment to section 12022.5, subdivision (c).

B. *The criminal street gang enhancement*

Contreras argues that the trial court exceeded its jurisdiction by staying, rather than striking, the 10 year prison term on the criminal street gang enhancement (§ 186.22, subd. (b)(1)).

⁷ The 60th day was actually November 12, 2017, but as that was a Sunday, the time would have been extended to the next business day, Monday, November 13, 2017.

Because the trial court has amended the abstract of judgment nunc pro tunc to reflect that Contreras's punishment for the criminal street gang enhancement was stricken rather than stayed, the issue is now moot.

III. DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Greenwood, P.J.

Elia, J.